D.P.U. 96-50-B (Phase I)

Investigation by the Department of Public Utilities on its own motion as to the propriety of the rates and charges set forth in the following tariffs: M.D.P.U. Nos. 944 through 970, filed with the Department on May 17, 1996, to become effective June 1, 1996, by Boston Gas Company; and investigation of the proposal of Boston Gas Company to implement performance-based ratemaking, and a plan to exit the merchant function.

APPEARANCES: Catherine L. Nesser, Esq.
Jeffrey M. Leupold, Esq.
Thomas P. O'Neill, Esq.
Boston Gas Company
One Beacon Street
Boston, Massachusetts 02108

-and-

James K. Brown, Esq.
Foley, Hoag & Elliot
One Post Office Square
Boston, Massachusetts 02109
FOR: BOSTON GAS COMPANY
Petitioner

Charles H. Shoneman, Esq.
Bracewell & Patterson, L.L.P.
2000 K Street, N.W.
Washington, D.C. 20006-5800
FOR: ALBERTA ENERGY COMPANY LIMITED; PROGAS LIMITED; PRODUCERS MARKETING LIMITED; TRANSCANADA GAS SERVICES
Intervenors

Patrick J. Hester
Vice President/General Counsel
1284 Soldiers Field Road
Boston, Massachusetts 02135
FOR: ALGONQUIN GAS TRANSMISSION COMPANY
Intervenor

Jeffrey F. Jones, Esq.
Laurie S. Gill, Esq.
Jay E. Gruber, Esq.
Palmer & Dodge
One Beacon Street
Boston, Massachusetts 02108
FOR: *ALL*ENERGY MARKETING COMPANY, INC.
Intervenor

J. Miles McKinney, Jr., Esq.
Amoco Production Company
550 Westlake Blvd.
Mail Code 1488W3
Houston, Texas 77079-2627
FOR: AMOCO CORPORATION
Intervenor

Robert Ruddock, General Counsel
Judith A. Sylvia, Esq.
Associated Industries of Massachusetts
222 Berkeley Street, P.O. Box 763
Boston, Massachusetts 02117-0763
FOR: ASSOCIATED INDUSTRIES OF MASSACHUSETTS
Intervenor

L. Scott Harshbarger, Attorney General
By: George B. Dean
James W. Stetson
William M. McAvoy
Frank P. Pozniak
Assistant Attorneys General
Regulated Industries Division
200 Portland Street
Boston, Massachusetts 02114
Intervenor

Paul K. Connolly, Jr., Esq.
Paul B. Dexter, Esq.
Méabh Purcell, Esq.
LeBoeuf, Lamb, Greene & MacRae
260 Franklin Street
Boston, Massachusetts 02110
FOR: BAY STATE GAS COMPANY
Intervenor

Emmett E. Lyne, Esq.
Rich, May, Bilodeau & Flaherty
294 Washington Street
Boston, Massachusetts 02108-1360
FOR: BERKSHIRE GAS COMPANY
Intervenor

John Deveraux, Esq.
City of Boston Law Department
City Hall, Room 615
Boston, Massachusetts 02201
FOR: CITY OF BOSTON
Intervenor

John Cope-Flanagan, Esq.
COM/Energy Services Company
One Main Street, P.O. Box 9150
Cambridge, Massachusetts 02142
FOR: COMMONWEALTH GAS COMPANY
Intervenor

Robert F. Sydney, General Counsel
Maribeth Ladd, Esq.
Commonwealth of Massachusetts
Division of Energy Resources
100 Cambridge Street, Suite 1500
Boston, Massachusetts 02202

-and-

Kenneth L. Kimmel, Esq.
Bernstein, Kushner & Kimmel, P.C.
One Court Street, Suite 700
Boston, Massachusetts 02108

FOR: COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ENERGY RESOURCES
Intervenor

Peter G. Esposito, Esq.
Gregory K. Lawrence, Esq.
John, Hengerer & Esposito
1200 17th Street, N.W., Suite 1600
Washington, D.C. 20036
FOR: DIRECT ENERGY MARKETING, INC.
Intervenor

Richard G. McLaughry, Esq.
Distrigas of Massachusetts Corporation
75 State Street, 12th Floor
Boston, Massachusetts 02109

-and-

John Traficonte, Esq.
Cabot Corporation
75 State Street
Boston, Massachusetts 02109
FOR: DISTRIGAS OF MASSACHUSETTS
CORPORATION
Intervenor

Peter G. Esposito, Esq.
Gregory K. Lawrence, Esq.
John, Hengerer & Esposito
1200 17th Street, N.W., Suite 1600
Washington, D.C. 20036
FOR: EASTERN ENERGY MARKETING, INC.
Intervenor

Andrew J. Newman, Esq.
Rubin and Rudman
50 Rowes Wharf
Boston, Massachusetts 02110
FOR: THE ENERGY CONSORTIUM
Intervenor

Randall S. Rich, Esq.
Bracewell & Patterson, L.L.P.
2000 K Street, N.W.

Washington, D.C. 20006-1809
FOR: ENRON CAPITAL AND TRADE RESOURCES CORP.
Intervenor

Phillip L. Sussler, Esq.
225 Main Street, 5th Floor
Hartford, Connecticut 06106
FOR: ERI SERVICES, INC.
Intervenor

Robert J. Keegan, Esq.
Keohane & Keegan
21 Custom House Street
Boston, Massachusetts 02110
FOR: ESSEX COUNTY GAS COMPANY
Intervenor

Emmett E. Lyne, Esq.
Eric J. Krathwohl, Esq.
Rich, May, Bilodeau & Flaherty
294 Washington Street
Boston, Massachusetts 02108
FOR: FALL RIVER GAS COMPANY
Intervenor

Usher Fogel, Esq.
Roland, Fogel, Koblenz, & Carr
One Columbia Place
Albany, New York 12207
FOR: GLOBAL PETROLEUM, INC.
Intervenor

William A. Williams, Esq.
Fulbright & Jaworski, L.L.P.
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2604
FOR: IMPERIAL OIL RESOURCES, INC.
Intervenor

Gregory K. Lawrence, Esq.
John, Hengerer & Esposito
1200 17th Street, N.W., Suite 1600
Washington, D.C. 20036
FOR: KEYSPAN ENERGY SERVICES, INC.

Intervenor

Edward L. Selgrade, Esq.
1050 Waltham Street
Lexington, Massachusetts 02173
FOR: TOWN OF LEXINGTON
Intervenor

Nancy Brockway, Esq.
National Consumer Law Center
18 Tremont Street
Boston, Massachusetts 02108
FOR: PEARL NOORIGAN AND SAMUEL GRAZIANO-LOW INCOME RATEPAYERS
Intervenors

Paul W. Gromer, Esq.
Northeast Energy Efficiency Council
77 North Washington Street
Boston, Massachusetts 02114-1908
FOR: NORTHEAST ENERGY EFFICIENCY COUNCIL
Intervenor

Emilio Petroccione, Esq.
Roland, Fogel, Koblenz, & Carr
One Columbia Place
Albany, New York 12207
FOR: MASSACHUSETTS OIL HEAT COUNCIL
Intervenor

C. Terry Callender
Vice President Regulatory Affairs
Natural Gas Clearinghouse
13430 Northwest Freeway, Suite 1200
Houston, Texas 77040-6095
FOR: NATURAL GAS CLEARINGHOUSE
Intervenor

Robert N. Werlin, Esq.
Keohane & Keegan
21 Custom House Street
Boston, Massachusetts 02110
FOR: NORTH ATTLEBORO GAS COMPANY
Intervenor

Gordon J. Smith, Esq.
Gregory K. Lawrence, Esq.
John, Hengerer & Esposito
1200 17th Street, N.W.
Washington, D.C. 20036

-and-

John R. Orr, Esq.
PanEnergy Gas Services, Inc.
One Westchase Center, 1077 Westheimer
Houston, Texas 77403

FOR: PANENERGY TRADING AND MARKET SERVICES, LLC
Intervenor

Richard J. Kruse, Vice-President and General Counsel
Cynthia A. Corcoran, Managing Counsel
Texas Eastern Transmission Corporation
P.O. Box 1642
Houston, Texas 77251-1642

FOR: TEXAS EASTERN TRANSMISSION COMPANY
Intervenor

James H. Norris, Esq.
Eckert Seamans Cherin & Mellott
600 Grant Street, 42nd Floor
Pittsburgh, Pennsylvania 15219

-and-

John F. Smitka, Esq.
Eckert Seamans Cherin & Mellott
One International Place, 18th Floor
Boston, Massachusetts 02110

FOR: TEXAS-OHIO GAS, INC.
Intervenor

William H. Penniman, Esq.
Sutherland, Asbill & Brennan
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2404

FOR: UNITED STATES GYPSUM, INC.
Intervenor

Peter G. Esposito, Esq.
Gregory K. Lawrence, Esq.
John, Hengerer & Esposito
1200 17th Street, N.W., Suite 1600
Washington, D.C. 20036
FOR: UTILICORP UNITED, INC.
Intervenor

Timothy A. Clark, Esq.
Colonial Gas Company
40 Market Street, P.O. Box 3064
Lowell, Massachusetts 01853
FOR: COLONIAL GAS COMPANY
Limited Participant

Thomas G. Robinson, Esq.
Amy G. Rabinowitz, Esq.
New England Power Service Company
25 Research Drive
Westborough, Massachusetts 01582
FOR: MASSACHUSETTS ELECTRIC COMPANY
Limited Participant

Susan Waller, Esq.
Tennessee Gas Pipeline
1010 Milam Street
Houston, Texas 77252-2511
FOR: TENNESSEE GAS PIPELINE COMPANY
Limited Participant

Larry S. McGaughy
Operating Manager
CNE Energy Services Group, Inc.
855 Main Street
Bridgeport, Connecticut 06604-4918
FOR: TOTAL LOUIS DREYFUSS ENERGY SERVICES, L.L.C.
Limited Participant

INTERLOCUTORY ORDER ON THE ATTORNEY GENERAL'S MOTION TO STRIKE EXTRA-RECORD EVIDENCE AND TESTIMONY AND OBJECTION TO RECONSIDERATION OF PARTIAL SETTLEMENT, AND BOSTON GAS COMPANY'S REQUEST FOR HEARING AND FOR PREHEARING CONFERENCE

I. INTRODUCTION

On November 29, 1996, the Department of Public Utilities ("Department") issued its final Order in Boston Gas Company, D.P.U. 96-50 (Phase I) (1996) (?Order"). On December 19, 1996, Boston Gas Company (?Boston Gas" or ?Company") filed with the Department a Motion for Reconsideration, Clarification and Recalculation of the Order (?Motion for Reconsideration"), accompanied by new exhibits and new testimony of six witnesses. On January 7, 1997, following the December 19, 1996 deadline for filing a Motion for Reconsideration, the Company submitted to the Department testimony of two new witnesses, supplemental testimony of one witness, and additional new exhibits as part of its Motion for Reconsideration. In its Motion for Reconsideration, the Company requested, inter alia, reconsideration of the Partial Settlement rejected in the Department's Order, and a hearing on certain issues (Motion for Reconsideration at 5, 11). On or before January 17, 1997, the Attorney General, Associated Industries of Massachusetts ("AIM"), Bay State Gas Company, Commonwealth of Massachusetts Division of Energy Resources ("DOER"), The Energy Consortium ("TEC"), Global Petroleum Corp., Low-Income Intervenors, the Marketer Group ("TMG"),[1] Massachusetts Oil Heat Council ("MOC") and United States Gypsum ("US Gypsum") filed responses to the Motion for Reconsideration.

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[1] For purposes of its response to the Company's Motion for Reconsideration, TMG consists of the following intervenors: Eastern Energy Marketing, Inc.; ERI Services, Inc.; PanEnergy Trading and Market Services, L.L.C.; and Utilicorp United, Inc.

On January 15, 1997, the Company filed a Request for a Prehearing Conference. The Attorney General and the Low-Income Intervenors filed responses to the Company's request for a prehearing conference. On January 17, 1997, the Attorney General filed a Motion to Strike Extra-Record Testimony ("Motion to Strike"), and an Objection to Boston Gas's Motion for Reconsideration of the Partial Settlement ("Attorney General Objection"). On January 24, 1997, the Company filed a response to the Motion to Strike and the Attorney General Objection.

The Department addresses below the Attorney General's Motion to Strike and the Attorney General Objection. In addition, the Department addresses the Company's Request for a Hearing and a Prehearing conference. The Department will issue a subsequent Order on all other aspects of the Motion for Reconsideration. In accordance with the provisions in 220 C.M.R. §1.11(9), the Department hereby notifies parties to the proceeding that the Department will not act on the Company's Motion for Recalculation within sixty days of its filing, but will issue its decision as a component of the subsequent order on the Motion for Reconsideration.

II. MOTION TO STRIKE

A. Introduction

Boston Gas has submitted with its Motion for Reconsideration fifty new exhibits and approximately 600 pages of new testimony, including the testimony of two new witnesses. The Company has characterized the new information as either (1) previously unknown or undisclosed facts, or (2) updates to information submitted during the proceeding. The new exhibits include a number of analyses and studies which, according to Boston Gas, demonstrate that the level of rates approved in the Order will have a deleterious effect on the Company's ability to attract

capital and maintain its quality of service.

The Attorney General has moved that the Department strike the extra-record testimony and exhibits submitted by the Company on December 19, 1996, with the Motion for Reconsideration, and the extra-record testimony and exhibits submitted by the Company on January 7, 1997 (Motion to Strike at 1).

B. Positions of the Parties

1. Attorney General

The Attorney General argues that in submitting its Motion for Reconsideration and accompanying new exhibits and new testimony, the Company is seeking to reopen the record in the proceeding under the "guise" of a motion for reconsideration (id. at 1). The Attorney General maintains that the Department's procedural rules provide for reopening the record in a proceeding only prior to the issuance of a decision (id., citing 220 C.M.R. § 1.11(8)). The Attorney General acknowledges that the Department has inherent authority to reopen a record and reconsider a decision, but contends that such action must be predicated upon exceptional circumstances (id. at 1-2 n.1, citing Aronson v. Brookline Rent Control Board, 19 Mass. App. Ct. 700, 704-706, rev. den., 395 Mass. 1102 (1985) (a board may reopen proceedings to determine whether a decision had been procured based on fraud or misrepresentation); Dispatch Communications of New England, D.P.U. 95-59-A at 5 (1996) (a procedural defect in notice to affected parties produced exceptional circumstances warranting reopening of record)).

The Attorney General asserts that the Company has failed to demonstrate that any of its claims rises to the level of extraordinary circumstances, and that Boston Gas merely is setting

forth dissatisfaction with the Department's Order (id. at 2 n.1). The Attorney General maintains that if the Department were to find that exceptional circumstances exist, the Department would "err on the facts," and the decision would be at odds with Department procedure and precedent (id. at 2 n.1, citing Boston Edison Company, D.P.U. 90-270-A at 2-3 (1991); 220 C.M.R. § 1.11).

Further, the Attorney General contends that the Company's new testimony and new exhibits constitute unsworn, ex parte testimony which cannot be considered as evidence filed by the Company (Motion to Strike at 3, citing 220 C.M.R. § 1.10(1)). The Attorney General also argues that G.L. c. 30A, § 11(4), the Massachusetts Administrative Procedure Act, supports the Attorney General's position that, absent a reopening of the record of this proceeding, which the Attorney General asserts is unjustified both procedurally and substantively, the Department should strike the extra-record exhibits and testimony
(id. at 5).

The Attorney General asserts that the Department previously has recognized the impropriety of the Company's thrusting extra-record, late-filed testimony before the Department (id. at 2-4, citing Boston Gas Company, D.P.U. 88-67, at 6-7 (Phase II)).[2] The Attorney General argues that Boston Gas's failure to heed prior admonitions issued by the Department warrants imposing sanctions on the Company, and at a minimum, striking the extra-record testimony and evidence (id. at 4).

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[2] In D.P.U. 88-67 (Phase II), the Department rejected the utility's request, filed after the submission of briefs, to file an affidavit purporting to demonstrate a revenue loss, and admonished the utility concerning the impropriety and prejudicial nature of its actions.

Accordingly, the Attorney General concludes that based on Massachusetts law, Department precedent and procedure, the Department must consider the Motion for Reconsideration based on the record evidence only (id. at 6).

2. The Company

Regarding the new testimony and exhibits filed with the Motion for Reconsideration, the Company admits that the Department has two options: (1) strike the new testimony and new exhibits filed with the Motion for Reconsideration; or (2) conduct adjudicatory hearings affording reasonable rights of discovery and cross-examination to interested parties prior to admitting such testimony and exhibits into evidence (Company Response at 2). However, the Company argues that the Motion to Strike "flies in the face" of the Department's standard of review on reconsideration, which provides that a moving party ?should present previously unknown or undisclosed facts that would have a significant impact on the decision" (id. at 2-3, citing Boston Edison Company, D.P.U. 90-270-A at 2-3 (1991)). Therefore, the Company claims that the movant must be allowed to make a showing of those unknown or undisclosed facts through exhibits, testimony, or other appropriate means (id. at 3).

Moreover, the Company avers that if the Department does not allow its updates relating to its confiscation claims, it is clear that the Supreme Judicial Court will (id., citing Boston Edison Co. v. Department of Public Utilities, 375 Mass. 1, 9 (1978) (quoting from Opinion of the Justices, 328 Mass. 679, 687 (1952)), aff'd., New England Tel. and Tel. Co. v. Department of Public Utilities, 371 Mass. 67, 71-71 (1976)). The Company asserts that if the Department grants the Motion to Strike, the Company would make a formal offer of proof regarding each fact and

opinion it has filed with its Motion for Reconsideration (id., citing 220 C.M.R. § 1.06(6)).

C. Analysis and Findings

The Department's policy on reconsideration is well settled. Reconsideration of previously decided issues is granted only when extraordinary circumstances dictate that we take a fresh look at the record for the express purpose of substantively modifying a decision reached after review and deliberation. North Attleboro Gas Company, D.P.U. 94-130-B at 2 (1995); Boston Edison Company, D.P.U. 90-270-A at 2-3 (1991); Western Massachusetts Electric Company, D.P.U. 558-A at 2 (1987).

A motion for reconsideration should bring to light previously unknown or undisclosed facts that would have a significant impact upon the decision already rendered. It should not attempt to reargue issues considered and decided in the main case. Commonwealth Electric Company, D.P.U. 92-3C-1A at 3-6 (1995); Boston Edison Company, D.P.U. 90-270-A at 3 (1991); Boston Edison Company, D.P.U. 1350-A at 4 (1983). The Department has denied reconsideration when the request rests on an issue or updated information presented for the first time in the motion for reconsideration. Western Massachusetts Electric Company, D.P.U. 85-270-C at 18-20 (1987); but see Western Massachusetts Electric Company, D.P.U. 86-280-A at 16-18 (1987). Alternatively, a motion for reconsideration may be based on the argument that the Department's treatment of an issue was the result of mistake or inadvertence. Massachusetts Electric Company, D.P.U. 90-261-B at 7 (1991); New England Telephone and Telegraph Company, D.P.U. 86-33-J at 2 (1989); Boston Edison Company, D.P.U. 1350-A at 5 (1983).

The Department has denied reconsideration of post-test year salary and wage adjustments

where a utility has presented for the first time in a motion for reconsideration evidence of other utilities' contract settlements and payroll consultants' projections to demonstrate the reasonableness of a wage increase. Berkshire Gas Company, D.P.U. 92-210-C at 10 (1993). The Department also has denied reconsideration where a party's claim is purely theoretical in nature, and constitutes additional argument of a substantive position taken during the case. D.P.U. 1350-A at 4.

The Department routinely permits the record to remain open after the close of hearings for receipt of updated information on non-controversial items that have been examined adequately on the record, such as rate case expense and property taxes. See, e.g., Milford Water Company, D.P.U. 92-101 (1992); Bay State Gas Company, D.P.U. 89-81, at 47 (1989).[3] The Department previously has stated that, in a rate case, it will allow companies to file "up-to-the-minute" adjustments, but that the line must be drawn when the final Order is issued. Western Massachusetts Electric Company, D.P.U. 85-270-C at 20 (1987). The filing of updated information also may be permissible in extraordinary or compelling circumstances. Bay State Gas Company, D.P.U. 89-81, at 45 (1989); Berkshire Gas Company, D.P.U. 905-C at 6-7 (1982).[4]

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[3] Even when updates have been allowed, a company is required explicitly to advise parties of its intention to file updates at the time it files its direct case or as soon as the need is identified to afford due process. Bay State Gas Company, D.P.U. 89-81, at 47-48 (1989); Western Massachusetts Electric Company, D.P.U. 86-280-A at 17 (1987).

[4] In D.P.U. 905-C, the expiration of a union contract, and resulting strike, shortly before the issue date of that order prevented that company from providing the Department with actual payroll increases pursuant to the ratified union contract until several days after the issue date of the Department's order. D.P.U. 905-C at 3, 6-7.

Such updates are based on information external to a company, and almost entirely outside the control of the company. Western Massachusetts Electric Company, D.P.U. 86-280-A at 17 (1987).

The Department has granted reconsideration based on updated data, when the utility has demonstrated that such information constituted updates of information already in the record. D.P.U. 905-C at 3, 6-7 (1982); Bay State Gas Company, D.P.U. 777-C at 4 (1982). Included in the new exhibits and new testimony is certain information consisting of studies and data which the Company has characterized as unknown or undisclosed facts. The Department finds that most of these studies and data could have been presented in the Company's initial filing or in support of the Partial Settlement. Further, the Company has not demonstrated extraordinary circumstances related to these unknown or undisclosed facts which would warrant the Department reopening the record in the proceeding or otherwise considering the exhibits and testimony at issue. Finally, most of this information is hypothetical in nature, and represents an attempt by the Company to reargue issues considered and decided in the case. As such, the Department finds that this information does not constitute unknown or undisclosed facts which would have a significant impact on the decision already rendered for which the Department must grant reconsideration.

With respect to the information that the Company has characterized as updated information, the Department accepted updates for rate case expense and property taxes in the instant proceeding (Exhs. AG-199 (supp.); DPU-21 (supp.)). The new items that the Company now describes as updates are not updates but an attempt by the Company to introduce new evidence and reargue issues long after the record in this proceeding has closed and a final Order issued. Moreover, the so-called updates are not the type of information that is outside the control of Boston Gas. The Department previously admonished Boston Gas for attempting to introduce evidence after the record had closed in another rate proceeding. See Boston Gas Company, D.P.U. 88-67 (Phase II) at 6-7 (1989). The Company has failed to heed the Department's previous warning.

The Department further finds that the circumstances surrounding the Company's updates are not extraordinary or compelling, which would warrant either reopening the proceeding or otherwise considering the exhibits and evidence at issue. Accordingly, the Department finds that the Company's proposed updates fail to meet the standard set forth for acceptance of updated information on reconsideration.

With respect to the Company's assertion that the Supreme Judicial Court will consider updated evidence on a confiscation claim, the Department acknowledges that the Supreme Judicial Court has the authority to accept new evidence on appeal. The Department, however, has found that the Company has not met the Department's standard for acceptance of new evidence on reconsideration, as discussed above. Further, the Department determined in its Order a return that was found to provide Boston Gas an opportunity to earn a fair and reasonable return

on its investment. Order at 132-133. The Department's determination meets the standard set forth by the Supreme Court by preserving the Company's financial integrity, allowing it to attract capital on reasonable terms, and providing the opportunity to obtain comparable earnings on investments of like risks. Id. at 132, citing Federal Power Commission v. Hope Natural Gas Company, 320 U.S. 591 (1942) and Bluefield Water Works and Improvement Company v. Public Service Commission of West Virginia, 262 U.S. 679 (1923).

Regarding the Company's stated intent to make an offer of proof if the Department grants the Motion to Strike, the Department reminds the Company that 220 C.M.R. §1.06 sets forth procedural rules relating to the conduct of hearings prior to the issuance of a final order. Therefore, any attempt by Boston Gas to make an offer of proof pursuant to 220 C.M.R. §1.06(6)(d)(4) on the exhibits and testimony stricken herein would occur after issuance of a final Order in this case, and would therefore be denied.

Based on the above analysis, the Department grants the Motion to Strike, and shall consider the Motion for Reconsideration based solely on record evidence.

III. OBJECTION TO RECONSIDERATION OF PARTIAL SETTLEMENT

A. Introduction

On November 15, 1996, the Company, AIM, the Attorney General, DOER, the Low-Income Intervenors and TEC (collectively, "Settling Parties") jointly filed a Motion for Approval of Offer of Partial Settlement and an Offer of Partial Settlement (collectively, ?Partial Settlement"). The Partial Settlement addressed the following issues: (1) additional base rate revenues; (2) low-income discount; (3) ratemaking treatment of interruptible transportation

margins; (4) pricing of interruptible transportation; (5) demand side management spending; (6) effective date of compliance under any performance-based ratemaking; (7) cost allocation; (8) customer charges; and (9) rate design for rate schedules G-44, G-45, G-54, and G-55. Order at 7. In its Order, the Department rejected the Partial Settlement. Order at 8. The Company has requested that the Department reconsider its rejection of the Partial Settlement (Motion for Reconsideration at 11-13). The Attorney General has objected to reconsideration of the Partial Settlement on procedural grounds. In their responses to the Motion for Reconsideration, AIM, DOER, TEC, TMG, and US Gypsum state their support of reconsideration of the Partial Settlement. None of the aforementioned parties, however, addresses the underlying procedural issues raised by the Attorney General relating to reconsideration of the Partial Settlement.

B. Positions of the Parties

1. Attorney General

The Attorney General argues that the Company's request for reconsideration of the Partial Settlement is in direct violation of the terms of the Partial Settlement (Attorney General Objection at 2). The Attorney General states that pursuant to the terms of the Partial Settlement, the Department was required to approve all terms of the Partial Settlement **?**without change or condition, on or before November 29, 1996" (Attorney General Objection at 2, citing Partial Settlement, § 12.5). Further, according to the Attorney General, the Partial Settlement provided that if the Department failed to approve the Partial Settlement, it would " be deemed withdrawn and void and shall not constitute any part of the record in this proceeding or be used for any other purpose" (id. at 2, citing Partial Settlement, § 12.5).

The Attorney General maintains that in seeking reconsideration of the Partial Settlement which was rejected by the Department, the Company has violated the terms of the Partial Settlement (id. at 6). Therefore, the Attorney General asserts that the Department must reject the Company's request to reconsider the adoption of the Partial Settlement (id. at 6).

2. The Company

The Company asserts that the expiration provision of the Partial Settlement presents no bar to the Department's adoption of its substantive terms in an order on the Motion for Reconsideration (Company Response at 3). The Company states that, if the Department considered it necessary or desirable, all of the signatories to the Partial Settlement have indicated their willingness to sign on to, or not object to, another filing (id. at 4).

C. Analysis and Findings

Pursuant to the terms of the Partial Settlement, the Settling Parties agreed, inter alia, that rejection of the Partial Settlement by the Department would render the Partial Settlement void and withdrawn, and that the Partial Settlement could not be used for any other purpose (Partial Settlement, § 12.5). In light of the Department's decision to reject the Partial Settlement, the Department finds that the Company's Motion for Reconsideration of the Partial Settlement violates the express language of the Partial Settlement. Moreover, any further attempt by the Settling Parties to "resurrect" the Partial Settlement is rendered null and void by its own terms, due to the Department's failure to approve it by November 29, 1996. In addition, the Company asserted no grounds under the standard of review for the Department to reconsider its rejection of

the Partial Settlement. The Department therefore finds that, pursuant to the express terms of the Partial Settlement, the Company is barred from seeking Department reconsideration of its disposition.[5] Accordingly, the Department sustains the Attorney General's Objection to the Company's Motion for Reconsideration of the Partial Settlement.

IV. COMPANY'S REQUEST FOR HEARING AND PREHEARING CONFERENCE

A. Introduction

The Company requested that the Department conduct both a hearing (Motion for Reconsideration at 5) and a pre-hearing conference on the Motion for Reconsideration (Request for Prehearing Conference).

B. Positions of the Parties

1. The Company

The Company states that although it recognizes that it is unusual for the Department to conduct a hearing on a motion for reconsideration, the complexity of the proceeding, as well as the impact of the Order on the operations of the Company over the course of the next six years, warrant the Department's accommodation of the Company's request (Motion for Reconsideration at 5). Further, the Company has requested that the Department convene a prehearing conference to address the procedures to be followed on the Motion for Reconsideration (Request for Prehearing Conference). The Company maintains that a full discussion of issues, including pre-

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[5] One of the issues addressed in the Partial Settlement is the pricing of interruptible transportation. Because the record evidence in Phase I on the pricing of interruptible transportation was not sufficiently developed, the Department was unable to make a determination on this issue. In Phase II, the Department fully intends to develop the record on the pricing of interruptible transportation, and will entertain any settlements on this issue and any other Phase II issue.

hearing discovery and prospective hearing dates, should facilitate an expeditious resolution of the matters set forth in the Motion for Reconsideration (id.).

2. Attorney General

The Attorney General maintains that in light of his motions relating to the Company's Motion for Reconsideration, including the Motion to Strike and Objection, a prehearing conference is presumptuous and premature (Attorney General Response to Request for Prehearing Conference).

3. Low-Income Intervenors

The Low-Income Intervenors support the Company's request for a pre-hearing conference to address procedural aspects of the Company's Motion for Reconsideration (Low-Income Intervenor Response to Request for Prehearing Conference).

4. MOC

MOC contends that the Department is not authorized to conduct a hearing on a motion for reconsideration (MOC Response to Motion for Reconsideration at 2).

C. Analysis and Findings

As a rule, the Department does not conduct hearings on motions for reconsideration. In light of the singular nature of this proceeding, which marks the first adjudication of a performance-based ratemaking plan for a jurisdictional gas utility, the Department hereby grants the Company's request for a hearing on its Motion for Reconsideration for the limited purposes set forth herein. The hearing shall be restricted to legal and factual arguments presented in the Motion for Reconsideration based on record evidence in the proceeding. In accordance with the

Department's disposition of the Attorney General's Motion to Strike, the Department will not entertain any legal or factual argument on the Motion for Reconsideration which relies on the stricken extra-record evidence or testimony. Moreover, only witnesses who testified during the original proceeding may be heard. Based on the determinations above, the Department finds no reason to conduct a prehearing conference in this matter. Accordingly, the Department rejects the Company's Request for a Prehearing Conference. The Department will conduct a hearing on the Company's Motion for Reconsideration on March 7, 1997 at 10:00 a.m. at its offices in Boston.

V. ORDER

Accordingly, after due notice and consideration, it is

ORDERED: That the Motion to Strike Extra-Record Evidence and Testimony, filed by the Attorney General on January 17, 1997, be and hereby is GRANTED; and it is

FURTHER ORDERED: That the Objection to the Motion for Reconsideration of the Partial Settlement filed by the Attorney General on January 17, 1997, be and hereby is SUSTAINED; and it is

FURTHER ORDERED: That the Request for a Hearing on the Motion for Reconsideration, Clarification, and Recalculation, filed by the Company on December 19, 1996, be and hereby is GRANTED; and it is

FURTHER ORDERED: That the Request for a pre-hearing conference on the Motion for Reconsideration, Clarification, and Recalculation, filed by the Company on January 15, 1997, be and hereby is DENIED.

By Order of the Department,

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John B. Howe, Chairman

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Janet Gail Besser, Commissioner